(25)

IN THE

Supreme Court of the United States

October Term, 1942

No. 1095 104

PACIFIC STATES SAVINGS AND LOAN COMPANY AND STATE GUARANTY CORPORATION,

Petitioners,

vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA, AND BRIEF IN SUPPORT THEREOF.

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vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Supreme Court of the United States:

Petitioners, Pacific States Savings and Loan Company (a corporation) and State Guaranty Corporation (a corporation), ask that a writ of certiorari issue to the Supreme Court of the State of California, to certify to this Court the record in the cause in said court numbered and entitled, "Babette M. Trede, Petitioner, vs. The Superior Court of the State of California, in and for the City and County of San Francisco, Respondent. Pacific States Savings and Loan Company, a Corporation; and State

Guaranty Corporation, a Corporation, Intervenors, S. F. No. 16827," and that the judgment in said cause be reviewed. In support thereof your petitioners respectfully show:

I.

Statement of the Matter Involved.

The judgment sought to be reviewed was entered in a proceeding for the issuance of a writ of prohibition brought by Babette M. Trede against the Superior Court of the State of California, in and for the City and County of San Francisco. [Tr. p. 3.]

The petition for writ of prohibition was filed in the Supreme Court of the State of California on September 1, 1942; and alleged in substance that the Building and Loan Commissioner of the State of California, on March 4, 1939 took possession of the property, business and assets of Pacific States Savings and Loan Company pursuant to the provisions of the Building and Loan Association Act of the State of California (Statutes of 1931, page 483, as amended), hereinafter referred to as "the Act"; that thereafter on March 6, 1939, pursuant to the provisions of section 13.12 of the Act, Pacific States Savings and Loan Company filed an action in the Superior Court of the State of California in and for the City and County of San Francisco, to enjoin further proceedings and to recover its business, property and assets; that on December 29, 1941, said Superior Court entered its judgment in said action in favor of the commissioner and against Pacific States Savings and Loan Company. That thereafter, within the time allowed by law, an appeal was duly taken from said judgment and was pending; that thereafter the Building and Loan Commissioner filed a

petition in said Superior Court for authority to sell certain real property in liquidation of said Pacific States Savings and Loan Company, and that the said Superior Court had overruled objections to the granting of such order and was about to enter an order authorizing the sale of said property in liquidation. The petition asked for a writ of prohibition to restrain the Superior Court from authorizing said sale in liquidation. [Tr. pp. 3-19.]

On October 6, 1942, the respondent in said proceeding for prohibition filed a demurrer to the petition [Tr. pp. 19-20] and also an answer. [Tr. pp. 20-24.]

On the same date, October 6, 1942, the Supreme Court of the State of California entered an order permitting the filing of a petition in intervention in said proceeding by the petitioners herein. [Tr. pp. 1-2.] On said date petitioners herein filed in said proceeding a petition in intervention, also asking for the issuance of a writ of prohibition to restrain the said Superior Court from entering an order authorizing said sale in liquidation, which petition in intervention contained additional allegations of fact. [Tr. pp. 25-31.]

On October 10, 1942, the respondent in said proceeding filed a demurrer to said petition in intervention [Tr. pp. 32-33] and also an answer. [Tr. pp. 33-37.]

On February 19, 1943, the Supreme Court of the State of California filed its opinion and order denying the petitions for the issuance of writ of prohibition. [Tr. pp. 38-42; 2.]

Thereafter, on March 11, 1943, within the time required by law, petitioners filed a petition in said proceeding for rehearing; and thereafter, on March 18, 1943, said petition for rehearing was denied. [Tr. pp. 2, 43.]

The petition in intervention filed in said proceeding by petitioners herein alleged the interest of State Guaranty Corporation in said proceeding as the owner of all the issued and outstanding capital stock of Pacific States Savings and Loan Company [Tr. p. 26]; alleged that the trial of the action brought by Pacific States Savings and Loan Company against the Commissioner of Corporations to enjoin further proceedings and to recover its business, property and assets commenced on March 20, 1939 and continued, with the exception of continuances from time to time, until October 14, 1941; that on September 17, 1941, said State Guaranty Corporation filed a complaint in intervention in said action, seeking the same relief as that sought by the complaint of Pacific States Savings and Loan Company [Tr. p. 27], alleging that the book value of the assets of Pacific States Savings and Loan Company was approximately $52,000,000, and that the aggregate amount of outstanding investment certificates of said company, disregarding dividends theretofore paid by the Building and Loan Commissioner pursuant to court order, was approximately $45,000,000; and alleging further that the total income from all of the assets of Pacific States Savings and Loan Company in possession of the Building and Loan Commissioner exceeded by a substantial amount the expense of maintaining, operating and administering said assets. [Tr. pp. 27-28.]

II.

Decision Below.

The opinion and decision of the Supreme Court of California sought to be reviewed is found in the Record at pages 38 to 42.

III.

Jurisdiction.

Petitioners have asserted all of their remedies in the Courts of the State of California, and deeming themselves aggrieved, and pursuant to section 237 (b) of the Judicial Code (as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 937), 28 U. S. C. A. Section 344(b), ask that on certiorari the decision of the Supreme Court of California be reversed.

IV.

Statute Involved.

We set out the pertinent portions of the Building and Loan Association Act of the State of California (as amended) under which the petition for prohibition proceeding was instituted and prosecuted in the Supreme Court of the State of California:

> "Sec. 13.11. Power to Take Possession of Association. If the commissioner as the result of any examination or from any report made to him or to any association doing business in this state or its investors or any thereof, shall find that such association is violating the provisions of its articles of incorporation or charter or by-laws or any law of this state, or is conducting its business in an unsafe or injurious man-

ner, he may by an order addressed to such association direct a discontinuance of such violations or unsafe or injurious practices and a conformity with all the requirements of law; and if such association shall not comply with such order within the time specified therein, or if it shall appear to the commissioner that any association is in an unsafe condition or is conducting its business in an unsafe or injurious manner such as to render its further proceeding hazardous to the public or to any or all of its investors, or if he shall find that its assets are impaired to such an extent that, after deducting all liabilities other than to its investors they do not equal or exceed the sum of the value of its outstanding shares and investment certificates and the par value of its outstanding stock or if any association shall refuse to submit its books, papers and accounts to the inspection of the commissioner or any of his examiners, deputies or assistants, or if any officer thereof shall refuse to be examined upon oath concerning the affairs of such association, then the commissioner may forthwith demand and take possession of the property, business and assets of such association and retain such possession until such association shall with the consent of the commissioner resume business, or until its affairs be liquidated. Such association may, with the consent of the commissioner, resume business upon such conditions as may be approved by him.

Sec. 13.12. Court Application by Association Aggrieved. Whenever any association of whose property, business and assets the commissioner has taken possession, as aforesaid, deems itself aggrieved thereby, it may at any time within thirty days after such taking possession apply to the superior court of the county in which the principal office of such association is located, to enjoin further proceedings; and said court after citing the commissioner to show

cause why further proceedings should not be enjoined, and hearing the allegations and proofs of the parties and determining the facts, may upon the merits dismiss such application or enjoin the commissioner from further proceedings and direct him to surrender such business, property and assets to such association. An appeal from such judgment enjoining the commissioner from further proceedings and directing him to surrender such business, property and assets to such association shall not operate as a stay thereof, unless the trial court in its discretion shall so order and no bond need be given if such appeal be taken by the commissioner; but if such judgment dismisses such application an appeal therefrom shall not operate as a stay thereof but the court rendering such judgment may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given as required by section 943 of the Code of Civil Procedure.

Sec. 13.13. Powers upon Taking Possession. Upon taking possession of the business, property and assets of any association, the commissioner may under his hand and official seal appoint a custodian, require from him a good and sufficient bond and place him in charge as his representative. Upon taking such possession, the commissioner shall have authority to collect all moneys due to such association and to give full receipt therefor, and to do such other acts as are necessary or expedient to collect, conserve or protect its business, property and assets. Unless the commissioner shall be enjoined from further proceedings and directed to surrender such business, property and assets or unless such association

shall with the consent of the commissioner resume business, then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided. Whenever the commissioner shall be in possession of the business, property and assets of any association, and regardless of whether or not he shall be liquidating the affairs of such association, the commissioner may in his discretion (1) apply to the superior court of the county in which the principal office in this state of such association is located for an order confirming any action theretofore taken by the commissioner, or authorizing the commissioner to do any act or to execute any instrument not expressly authorized by this act, which order shall be given and made after a hearing on such notice as the court shall prescribe; (2) pay and discharge any secured claims against such association, whether or not such claims shall theretofore have been presented for payment or have become barred from presentation by the expiration of the time limit hereinafter specified; provided that no such claim shall be paid in an amount larger than the then value of the security therefor; (3) pay such administrative or current expenses incurred prior to the taking of possession by the commissioner as may be necessary or convenient to the orderly or economic liquidation or preservation of the assets, and pay all wages or salaries, not exceeding two hundred fifty dollars per month to any one person, earned within six months prior to the taking of possession by the commissioner, whether or not claims for such expenses, wages or salaries shall theretofore have been presented for payment, or shall have become barred from presentation by the expiration of the time limit hereinafter specified; or (4) within six months after obtaining knowledge of the existence thereof, disaffirm any executory contracts (including leases) to which such association

is a party, and disaffirm any partially executed contracts (including leases) to the extent that they remain executory. (Amended Stats. 1935, p. 1507.)

Sec. 13.14. Noncompliance with Orders. Whenever the commissioner shall demand possession of the property, business and assets of any association, pursuant to section 6.05, section 6.08, or section 13.11 of this act, the refusal of any officer, agent, employee or director of such association to comply with such demand shall constitute a misdemeanor, punishable by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than ninety days, or by both such fine and imprisonment; and if such demand be not complied with within twenty-four hours after service, the commissioner may call to his assistance the sheriff of the county in which the principal place of business of such association is located, by written demand under his hand and official seal, whereupon it shall become the duty of such official to enforce the demands of the commissioner.

Sec. 13.15. Officers Must Furnish Schedule of Property. Upon taking possession of the property, business and assets of any association, the commissioner shall require the president and secretary of such association to, and such officers shall, make a schedule of all its property and assets and of all collateral held by it as security for loans and make oath that such schedule sets forth all such property, assets and collateral and shall deliver such schedule, and the possession of any and all such property, assets and collateral as may not have been so previously delivered, to the commissioner, who may at any time examine under oath such president and secretary, or other officers of such association, or the directors, agents or employees thereof, to determine whether

or not all such property, assets or collateral have been transferred and delivered into his possession. The power of the commissioner to issue subpoenas and to require attendance of parties for examination under this section shall be as provided for in section 13.08 of this act. (Amended Stats. 1935, p. 1508.)

Sec. 13.16. Powers upon Liquidation. In liquidating the affairs of an association, the commissioner shall have power to collect all moneys due to, and claims of, such association and to give full receipt therefor; to release or reconvey all real or personal property pledged, hypothecated or transferred in trust as security for loans; to approve and pay all just and equitable claims; provided, that shares shall participate ratably with investment certificates in the case of any association in which shareholders shall have heretofore been granted the right and option by the association to exchange their shares for investment certificates of equal value; to commence and prosecute all actions and proceedings necessary to enforce liquidation; and on the order of the superior court of the county in which the principal office in this state of such association is located, given and made after a hearing on such notice as the court shall prescribe, to compound bad or doubtful debts or claims, or to borrow money, or to sell, convey or transfer real or personal property. If a purchaser for any property or any bad or doubtful debt or claim can not be obtained and it appears improbable in the case of any such bad or doubtful debt or claim that recovery thereon can be had, and that the cost of action to enforce collection of the same would probably be lost, the court may direct that suit thereon need not be brought, and if in the case of any such property it appears improbable that anything can be realized therefrom and that the cost of maintaining, preserving or protecting said property would probably be

lost, the court may direct the commissioner to abandon the same. For the purpose of executing and performing any of the powers and duties hereby conferred upon him the commissioner may in the name of such association or in his own name prosecute and defend any and all suits and other legal proceedings and may in the name of such association or in his own name as commissioner execute, acknowledge and deliver any and all deeds, assignments, releases, requests for reconveyance, and other instruments necessary and proper to effectuate any sale of real or personal property or other transaction in connection with the liquidation of such association; and any deed, assignment, release, request for reconveyance or other instrument executed pursuant to the authority hereby given shall be valid and effectual for all purposes as though the same had been executed by the officers of such association by authority of its board of directors. In case any of the real property so sold is located in a county other than the county in which the application to the court for leave to sell the same is made, the commissioner shall cause a certified copy of the order authorizing or ratifying such sale to be recorded in the office of the recorder of the county in which such real property is located.

Upon determining to liquidate an association, the commissioner shall cause an inventory of all the assets of such association to be made in duplicate, the original to be filed with the court and the duplicate in the office of the commissioner. He shall cause notice to be given by publication once a week for four successive weeks in some newspaper of general circulation published at or near the principal place of business in this State of such association, to all persons having claims against it as creditors or investors or otherwise, to present and file same and make legal

proof thereof at a place and within a time to be designated in such publication, which time shall be not less than six months after such first publication; and within ten days after such first publication he shall cause a copy of such notice to be mailed to all persons whose names appear of record upon its books as creditors or investors; and upon the expiration of the time fixed for the presentation of claims, the commissioner shall prepare or cause to be prepared in duplicate a full and complete schedule of all claims presented, specifying by classes those that have been approved and those that have been disapproved and shall file the original with the court and the duplicate in the office of the commissioner. Not later than five days after the time of filing such schedule with the court, written notice shall be mailed to all claimants whose claims have been rejected. Action to enforce the payment of or to establish any rejected claim must be brought and service had within four months from and after the date of filing of the schedule of claims with the proper court; otherwise all such actions shall be forever barred. All claims, demands or causes of action of whatever nature, and regardless of whether or not a suit shall be pending to enforce the same at the time of the taking possession of the assets of the association by the commissioner, of creditors, and persons other than investors against the association or against any property owned or held by it in trust or otherwise, must be presented to the commissioner in writing, verified by the claimant, or some one in his behalf, within the period limited in the above mentioned notice for the presentation of claims; and the commissioner shall have no power to approve any claim not so presented, and any such claim, demand or cause of action not so presented shall be forever barred. Any investor, without presenting a claim, shall be en-

titled, as to any dividends hereafter declared, to share in such dividends to the extent, and in the proper relative order of priority, of any claim shown by the books of the association to exist in his favor against the association.

The commissioner may under his hand and official seal appoint one or more special deputies to assist in the duties of liquidation and distribution under his direction and may also employ such special legal counsel, accountants and assistants as may be needful and requisite and fix the salaries and compensation to be allowed and paid to each. All such salaries and compensation with such other reasonable and necessary expenses as may be incurred in the liquidation shall be paid by the commissioner from the funds of such association in his hands. Such expenses shall include, among other things, that part of the salary of the commissioner and of his deputies, examiners, accountants, appraisers and other assistants, and that part of the general expenses of the commissioner's office, as shall fairly represent, in the opinion of the commissioner, the proportion thereof properly attributable to such liquidation. From the net realization of assets in excess of such salaries, compensation and expenses, the commissioner shall first pay all claims heretofore or hereafter approved by him in the sum of less than ten dollars, other than the claims of shareholders or stockholders, and other than the claims of certificate holders or other creditors who shall object in writing to such payment. Such claims of less than ten dollars shall be paid at their surrender value as estimated by the commissioner and fixed and determined by the court on the same basis as claims are received in payment of real property as provided for by section 13.16a, and all such claims shall thereupon be canceled.

The commissioner shall then pay all claims approved in the sum of ten dollars or more, other than the claims of shareholders and stockholders, without distinction or preference as between the claims of certificate holders and other creditors; and thereafter he shall distribute and pay dividends in liquidation first to the shareholders until their claims are fully paid or such assets or funds are exhausted, and second, if any such assets or funds remain, to the stockholders until such assets or funds are exhausted; provided, however, notwithstanding anything to the contrary herein contained, in the case of any association in which shareholders shall have heretofore been granted the right and option by the association to exchange their shares for investment certificates of equal value he shall distribute and pay dividends in liquidation to such shareholders without distinction or preference as between the claims of such shareholders and the claims of certificate holders and other creditors. Such distributions shall be made as funds are available therefor to the extent of ten per cent or more of the approved claims of the class of claimants then entitled to distribution, and shall continue until all the assets have been realized upon and a final dividend in liquidation shall be declared and paid. Where the commissioner shall have taken possession of an association and commenced paying dividends in liquidation prior to the effective date of this section, as amended, he shall nevertheless pay the claims of certificate holders or other creditors approved in the original sum of less than ten dollars, as hereinabove provided for, before paying other dividends in liquidation to those claimants whose claims were originally approved in the sum of ten dollars or more. Upon the payment of a final dividend in liquidation, the commissioner shall prepare and file with the court a full and final statement

of the liquidation, including a summary of the receipts and disbursements, and a duplicate thereof shall be filed in the office of the commissioner and after due hearing and approval by the court, the liquidation shall be deemed to be closed.

The determination by the commissioner to liquidate any association, evidenced by filing written notice of such determination with the court, shall operate to stay or dissolve any or all actions or attachments instituted or levied within thirty days next preceding the taking of possession of such association by the commissioner, and pending the process of liquidation as herein provided no attachment or execution shall be levied or lien created upon any of the property of such association.

Whenever in the case of any association which shall have issued stock, the commissioner shall have fully liquidated all claims other than claims of stockholders, and shall have made due provision for any and all known but unclaimed liabilities, excepting claims of stockholders, and shall have paid all expenses of liquidation, then upon the written request of the holders of a majority of the stock of such association any surplus that may then remain in his hands, together with all the records and effects, shall be delivered to the association or its trustees, and thereafter such association or its trustees shall have title thereto free from any claim of the commissioner. (Amended Stats. 1913, p. 2719; Stats. 1935, p. 1500.)"

Statutes of California, 1931, page 483, Chap. 269;

Statutes of California, 1933, page 2719, Chap. 1059;

Statutes of California, 1935, page 1497, Chap. 451.

V.

Questions Presented.

Whether the Supreme Court of the State of California erred in deciding that the proceeding for the sale of real property in liquidation in the Respondent Superior Court, pending the appeal from the decision of that Court, did not violate the provisions of the Fourteenth Amendment to the Constitution of the United States, and particularly that portion thereof reading, "nor shall any State deprive any person of life, liberty or property without due process of law."

VI.

Summary Statement of the Case.

On March 4, 1939, the Building and Loan Commissioner of the State of California, purporting to act under the provisions of section 13.11 of the Act above quoted, peremptorily and without notice summarily seized the property, business and assets of Pacific States Savings and Loan Company. Thereafter, on March 6, 1939, Pacific States Savings and Loan Company, pursuant to the provisions of section 13.12 of the Act above quoted, filed a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover possession of its property, business and assets, and to enjoin further proceedings. [Tr. pp. 26-7.]

The trial of said action commenced on March 20, 1939 and continued, with the exception of continuances from time to time, until October 14, 1941. [Tr. p. 27.] There-

after, on December 30, 1941, the said Superior Court entered its judgment in favor of the Building and Loan Commissioner and against Pacific States Savings and Loan Company and Intervenor, State Guaranty Corporation. [Tr. p. 27.] Thereafter, Pacific States Savings and Loan Company and State Guaranty Corporation filed notices of appeal from said judgment within the time allowed by law, and said appeal remains pending and undetermined. The said Superior Court did not enjoin further proceedings by the Building and Loan Commissioner, as provided in section 13.12 of the Act above quoted.

The petitioners are deprived of the benefit of due process of law, for the reason that if the Building and Loan Commissioner may proceed to liquidate said assets, pending the determination of said appeal, the appeal, which is an integral and essential part of the due process of law provided by the statutes of the State of California, will be of no value or effect; and in the event of the determination thereof in favor of the petitioners, the Building and Loan Commissioner will not be in a position to return or restore to Pacific States Savings and Loan Company the property, business and assets seized.

VII.

Reasons Relied on for Allowance of Writ.

The decision of the Supreme Court of the State of California, under the circumstances hereinbefore set forth, deprives petitioners of the benefit of due process of law and of the guaranty of due process of law contained in the Fourteenth Amendment to the Constitution of the United States.

Wherefore, it is prayed that a writ of certiorari issue under the seal of this Court, to the Supreme Court of the State of California, commanding that Court to certify and forward to this Court a full transcript of the record and proceedings in the cause, to the end that its judgment may be reviewed and reversed; and for such other relief as is proper.

Dated, Los Angeles, California, June 9, 1943.

BYRON C. HANNA,
HAROLD C. MORTON,
Attorneys for Petitioners.

IN THE

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No.....

PACIFIC STATES SAVINGS AND LOAN COMPANY AND STATE GUARANTY CORPORATION,

Petitioners,

vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Statement of the Case.

A statement of the case has been set forth in the Petition (pp. 16 and 17), and to avoid duplication, is not repeated.

II.

Specification of Error.

The error complained of consists of the decision of the Supreme Court of the State of California, that the Su-

perior Court of said State, in and for the City and County of San Francisco, may authorize the sale in liquidation of real property of Pacific States Savings and Loan Company, pending the appeal in the action by said Company to recover its property, business and assets, without violating the guaranty of due process of law contained in the Fourteenth Amendment to the Constitution of the United States.

III.

Petitioners Were Deprived of the Benefit of the Guaranty of Due Process of Law.

The provisions of the Building and Loan Association Act of the State of California quoted in the Petition at page 5 provide for the summary seizure and liquidation of building and loan associations.

Section 13.11 of the Act provides for the summary seizure of such assets without notice.

Section 13.12 provides that the building and loan association may institute an action to recover its property, business and assets and to enjoin further proceedings. This section further recognizes the right of appeal as an integral part of such proceedings. It further specifies that in the event the judgment in such a proceeding is adverse to the building and loan commissioner and the building and loan commissioner is enjoined from further proceedings, and directed to surrender the business, property and assets to the association, an appeal therefrom "shall not operate as a stay thereof, unless the trial court in its discretion shall so order * * *."

The section further provides that if the judgment is adverse to the association, an appeal "shall not operate

as a stay thereof, but the court rendering such judgment may, in its discretion, enjoin the commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, provided a bond shall be given, etc."

Section 13.13 prescribes the powers of the building and loan commissioner upon taking possession of the business, property and assets, and provides, among other things: "Unless the commissioner shall be enjoined from further proceedings and directed to surrender such business, property and assets or unless such association shall with the consent of the commissioner resume business, then the commissioner shall proceed to liquidate the affairs of such association as hereinafter provided."

The subsequent provisions of the Act quoted prescribe the powers of the commissioner in liquidation.

It will be observed that the seizure of the business, property and assets may be made without notice, and that the procedure provided by statute to meet the requirements of "due process" includes the right of appeal.

The authority is vested in the Superior Court to enjoin the commissioner, pending the appeal, from further proceedings, and to direct him, pending the appeal, to surrender the business, property and assets to the association. The language is in the conjunctive, and does not authorize the Superior Court to enjoin further proceedings, pending the appeal, without also directing the return of the business, property and assets to the association.

The construction placed upon the statute by the Supreme Court of the State of California is to the effect that in the absence of such an order by the Superior Court,

the building and loan commissioner may proceed to liquidate the business, property and assets of the association. This may easily deprive petitioners of any benefit of the right of appeal, which is an integral part of the procedure. We recognize the principle that "due process" does not require that any right of appeal be provided. 16 *Corpus Juris Secundum,* page 1277, para. 626, and cases there noted.

Where, however, a right of appeal is provided as an integral part of the procedure designed to constitute due process of law, such right of appeal becomes an essential part of the "due process."

> *Frank v. Mangum,* 237 U. S. 309, 59 L. ed. 969;
>
> *United States v. Mills,* 21 F. Supp. 616, 618 (D. C. E. D. Pa.).

Under these circumstances, if the property summarily seized and held, pending the appeal, may be so dealt with as to render the appeal futile and ineffective, the statutory procedure provided then fails to meet the requirements of "due process."

The principle of "due process" under the circumstances here presented requires that the responsibility for the full, complete and effective judicial determination be definitely settled. This rquirement may be met by imposing this responsibility upon a single judicial officer or tribunal without any right of review; or it may be met by imposing the responsibility in the first instance upon a judicial officer or tribunal and providing a right of review. But in the latter case, the review should be equally as effective as the initial determination. If the right of review be ineffective, the result is that the responsibility of the initial

judicial tribunal is diminished without a compensating effective power in the reviewing tribunal.

It is a matter of common knowledge that where a right of appeal exists, trial judges are frequently influenced in their decisions by the consciousness that if an error is committed, a reviewing court will correct it. If no review is provided, a conscientious trial judge will ordinarily exercise a higher degree of care to protect the rights of all parties in his decision than otherwise. In practical effect the right of review involves a division of responsibility, and something less than complete responsibility is attained if the right of review be rendered ineffective in its consequences.

Protection of the right of "due process" requires that forms be disregarded and that inquiries be directed to the substance of the matter. This Honorable Court has frequently announced that principle.

Frank v. Mangum, 237 U. S. 309, 331, 59 L. ed. 969, 982;

Moore v. Dempsey, 261 U. S. 86, 67 L. ed. 543;

Mooney v. Holohan, 294 U. S. 103, 79 L. ed. 791;

Re Nielsen, 131 U. S. 176, 33 L. ed. 118;

Johnson v. Zerbst, 304 U. S. 458, 467, 82 L. ed. 1461, 1468.

There is little of the substance of due process of law in a procedure which permits:

(a) a summary seizure of private property without notice;

(b) a judicial proceeding to inquire into the merits of the seizure, which involves as an integral part the right of appeal;

(c) the authority, pending appeal, to deal with the property summarily seized so as to deprive the right of appeal of any effect or benefit.

These are the attributes of the proceeding presented by the record in this case.

The procedure outlined is illusory when measured by the requirements of due process of law. The association whose assets are thus summarily seized without notice may find itself before a tribunal in which doubtful questions are decided with reference to the right of review, and then suffer the liquidation of its property before a decision on appeal can be obtained.

Certainly, where property is taken in such a summary manner, it should be held intact unless there is some emergent or necessitous reason for disposing of it (absent in this case), until the remedies provided by law to determine the justification of such summary seizure have been pursued to finality.

For these reasons, it is respectfully urged that the writ of certiorari be issued as prayed for in the petition.

Dated, Los Angeles, California, June 9, 1943.

BYRON C. HANNA,
HAROLD C. MORTON,
Attorneys for Petitioners.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. [redacted]104

PACIFIC STATES SAVINGS AND LOAN COMPANY and STATE GUARANTY CORPORATION,
Petitioners,

vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

BRIEF FOR RESPONDENT SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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In the Supreme Court
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No. 1095

PACIFIC STATES SAVINGS AND LOAN COMPANY and STATE GUARANTY CORPORATION,
Petitioners,

vs.

BABETTE M. TREDE and SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

BRIEF FOR RESPONDENT SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of California is reported in Volume 134 Pacific (2d) page 745 and shows that decision was filed February 19, 1943, and a rehearing denied March 18, 1943.

II. JURISDICTION.

The date of the judgment of the Supreme Court of the State of California sought to be reviewed was February 19, 1943 (R. p. 38, folio 68). A re-hearing was denied by the Supreme Court of California on March 18, 1943 (R. p. 43, folio 77).

Petition for a writ of certiorari was filed June 15, 1943, and served on the Attorney General of the State of California on June 24, 1943.

Jurisdiction is disputed for lack of a final judgment within the meaning of Section 237(b) of the Judicial Code, and for lack of a substantial Federal question.

III. CORRECTION AND AMPLIFICATION OF STATEMENT OF THE CASE.

Nowhere in the record or in the petition for the writ of certiorari in this case does it appear that any application was ever made pursuant to Section 13.12 of the Building and Loan Act of California (printed in petitioners' petition herein p. 7), to the court rendering the judgment for an injunction against the Commissioner pending the appeal from further proceedings, or directing him, pending the appeal, to surrender the business property and assets of the association, or that any application was ever made by petitioner or the intervenors for an order fixing the amount of bond for such stay or injunction, pursuant to Section 943 of the Code of Civil Procedure of California, or that any such bond was ever tendered to said Superior Court by either petitioner for the

writ of prohibition or the intervenors herein, the petitioners for the writ of certiorari in this case; nor was any application ever made to the Supreme Court of California for a writ of supersedeas to obtain a stay of liquidation pending the appeal mentioned in Paragraph III of the petitioners' petition for a writ of prohibition (R. p. 4).

IV. SUMMARY OF ARGUMENT.

A. The petition for writ of certiorari should be denied for want of a final judgment under 28 U. S. C. A. 344 (Jud. Code, Section 237).

B. The petition for writ of certiorari should be denied for lack of any substantial Federal question.

C. On the merits, the petition for a writ of certiorari should be denied for want of a substantial Federal question.

V. ARGUMENT.

A. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A FINAL JUDGMENT UNDER 28 U. S. C. A. 344 (JUD. CODE, SECTION 237).

We are aware of the rulings of this Court that prohibition is an independent proceeding and that the judgment therein is a final judgment. We are also aware that in *Bandini Petroleum Co. v. The Superior Court,* 284 U. S. 8, 14, this Court has held that a denial of a writ of prohibition to an inferior tribunal is a final judgment supporting the jurisdiction of this Court.

Nevertheless, it seems to us that there is a vast difference between a final judgment *granting* a writ of prohibition which, in effect, puts an end to the respondents' rights in the courts of a state, and a judgment *denying* a writ of prohibition to a lower *court,* which must be assumed to proceed under due process and where, presumptively, every safeguard will be afforded to the petitioners in the court below. Such a judgment is in substance a remand with directions to proceed not inconsistently with the decision above. Such a judgment should *not* be deemed a *final* judgment.

Laclede Gas Co. v. Public Service Comm., 304 U. S. 398;

Hand v. Haygood, 131 U. S. App. CLXXXI, 26 L. Ed. 301.

The denial of prohibition here, in effect, remanded the matter to the superior court to proceed with its judicially-controlled sale according to all the process of law given by the State of California.

B. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED FOR LACK OF ANY SUBSTANTIAL FEDERAL QUESTION.

The charge that a statute allowing an appeal, without necessarily staying the execution of the judgment appealed from, denies due process of law, has been considered so unsubstantial by this Court and other Federal courts that have passed upon it, that they have refused to dignify it with argument.

McKane v. Durston, 153 U. S. 684, 688.

Harlan, J. says:

"What has been said is sufficient to indicate that in our judgment, there is nothing of merit in this contention. It need not be further noticed."

In re Durrant (CC Cal. 1898), 84 Fed. 317, 319 (Coram Morrow, Circuit Judge, and DeHaven, District Judge).

DeHaven, J. says:

"It is claimed by the petitioner:

"First, that sections 1227 and 1243 of the Penal Code of the State of California are in violation of the Constitution of the United States, because they do not provide that an appeal from an order directing its execution, made after a final judgment of conviction, shall, of itself, operate to stay the execution of such judgment. This contention is manifestly untenable, and nothing further need be said upon that point."

C. ON THE MERITS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED FOR WANT OF A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Supreme Court of California does not deprive the petitioners or the intervenors of property without due process of law.

Lott v. Pittman (1916), 243 U. S. 588, 591.

McKenna, J. says:

"Besides, the right of appeal is not essential to due process. *Reetz v. Michigan,* 188 U. S. 505,

508. It was therefore competent for the State to prescribe the procedure and conditions, and the cases cited by appellant are not apposite."

McKane v. Durston, 153 U. S. 684, 687.

Harlan, J. says:

"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

"It is, therefore, clear that the right of appeal may be accorded by the State to the accused upon such terms as in its wisdom may be deemed proper. * * * But, as already suggested, whether an appeal should be allowed, and if so, under what circumstances or on what conditions, are matters for each State to determine for itself."

Andrews v. Swartz, 156 U. S. 272, quotes and follows *McKane v. Durston,* supra.

Murphy v. Massachusetts, 177 U. S. 155, 158.

Fuller, C. J. says:

"And we have repeatedly decided that the review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, is not a necessary element of due process of law, and that the right of appeal may be accorded by the State to the accused upon such conditions as the State deems proper."

American Surety Co. v. Brim (1933), 176 La. 867, 147 So. 18, 19.

St. Paul, J. says:

> "As an appeal is not necessary to due process of law, a State may annex any conditions it pleases to the granting of an appeal."

In *ex parte Martinez* (Tex. Crim. App. 1912), 145 S. W. 959, 994,

Harper, J. says:

> "What is due process of law in the states is regulated by the law of the state. (Citing cases.)"

The same ruling has been made with regard to the due process clause of the *Fifth* Amendment.

Clawson v. U. S., 113 U. S. 143 (appeal from the Territory of Utah);

U. S. v. Heinze, 218 U. S. 532, 545-6.

But it is a sufficient answer to the complaint of the petitioners here that the record does not show that they ever made application to the court from which the appeal was taken for a stay order or injunction, or ever applied to that court to fix a bond, or ever tendered a bond under the Building and Loan Act of the State of California. That Act, Sec. 13.12 thereof, (Petition herein p. 7) reads:

> "An appeal from such judgment enjoining the Commissioner from further proceeding and directing him to surrender such business, property and assets to such association *shall not operate as a stay* thereof, unless the trial court in its discretion shall so order and no bond need be given if such appeal be taken by the Commis-

sioner; but if such judgment dismisses such application an appeal therefrom shall not operate as a stay thereof but the court rendering such judgment may, in its discretion, enjoin the Commissioner, pending the appeal, from further proceedings and direct him, pending the appeal, to surrender such business, property and assets to such association, providing a bond shall be given as required by Section 943 of the Code of Civil Procedure."

Section 943 of the Code of Civil Procedure requires an undertaking to be entered into on the part of the appellant with at least two sureties, and in such amount as the court, or a judge thereof, may direct, to the effect that the appellant will obey the order of the appellate court upon the appeal, or will pay all damages which the respondent may sustain by reason of such stay, not exceeding an amount to be fixed by the Judge of the court in which the judgment was rendered or order made, which amount must be specified in the undertaking.

Nor does it appear that the petitioners here ever applied to the court to which the appeal was taken for a writ of supersedeas staying proceedings below.

The California court has complete power to protect the subject matter of its litigation pending appeal.

Hill v. Finnigan, 54 Cal. 493, 495.

McKinstry, J. says:

"The statute does not treat of undertakings in the Supreme Court, but we have no doubt but that this court has an inherent power to secure to

> the appellants the fruits of a successful appeal, if it can be done without depriving the respondent of a substantial right."

This is done by the issuance of a writ of supersedeas.

Luckenbach v. Krempel, 188 Cal. 175, 177.

The record shows no application for a writ of supersedeas.

Notwithstanding the appellate jurisdiction of the United States Supreme Court and other Federal courts is given in the Third Article, subject to such regulations as Congress may from time to time prescribe, it is nevertheless true that Congress could not provide regulations which deprived a citizen of property without due process of law under the Fifth Amendment. And neither could the Supreme Court of the United States by rule or decision.

28 U.S.C.A. sections 227 and 874, and Equity Rules 33 and 36, made the granting of a stay order or a supersedeas discretionary with the court.

The same thing was true in the matter of appeals in chancery in England prior to 1772.

The history of stays on appeal in chancery is stated and the cases are collected in

Tulare Irrig. Dist. v. Superior Court, 197 Cal. 649, 660-665.

Yet it has *never,* during the 156 years of our nation's existence, been suggested by anyone that the fact that this discretion is reposed in the court ap-

pealed from, denies due process of law under the Fifth Amendment, nor has anyone suggested, since 1215 A.D., that the English practice ran counter to the 29th section of Magna Carta.

Slaughter House cases, 77 U. S. 273, 297.

Clifford, J. says:

> "Neither does an appeal from an order dissolving an injunction suspend the operation of the order so as to entitle the appellant to stay the proceedings pending the appeal, as a matter of right, either in a suit at law or in equity."

Hovey v. McDonald, 109 U. S. 150, 162.

Bradley, J. says:

> "Of course, where the power (to stay the force of a judgment) is not exercised by the court, nor by the judge who allows the appeal, the decree retains its intrinsic force and effect.
>
> "Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal although it was in the power of the Special Term to have continued the injunction, and to have retained the fund in its control in the hands of the receiver had it seen fit so to do."

In *Leonard v. Ozark Land Co.,* 115 U. S. 465, 468, the court says:

> "Finding that such a practice, if permitted (modifying the injunction granted by the decree below in advance of final hearing of an appeal on its merits) would sometimes involve an examination of the whole case and necessarily take much time, we promulgated the present equity rule 93."

Knox County v. Harshman, 132 U. S. 14, 16.

Fuller, C. J. says:

> "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction, does not disturb its operative effect. * * * A fortiori, the mere prosecution of an appeal cannot operate as an injunction when none has been granted."

This discretion of the lower court to grant an injunction or a supersedeas is not a matter of right, but in the discretion of the lower court.

Re Haberman Mfg. Co., 147 U. S. 525, holding that the discretion of the lower court is not controllable by mandamus.

The court is slow to grant such a supersedeas.

Chadeloid Chemical Co. v. Chalmers Co. (CCA, N.Y. 1917) 242 Fed. 71, an application to Ward, Circuit Judge, for supersedeas was denied.

Hamnsen v. Pusey Co. (DC Dela. 1923), 286 Fed. 707, 710.

Morris, J. says:

> "No order staying the proceedings has been entered in this cause by this court, or the appellate court, or a judge thereof, nor has such order been applied for."

And he holds that certiorari to the Supreme Court from the Circuit Court of Appeals after decision on appeal, if a supersedeas at all, has no greater effect than had the appeal.

In the *Hannsen* case it was held that the granting of a certiorari by the Supreme Court to the Circuit Court of Appeals on appeal from an order of the District Court appointing the receiver, did not suspend further proceedings in the District Court.

> *Eureka Consolidated Mining Co. v. Richmond Mining Co.*, 5 Sawyer (USCC) 121, Fed. Cas. No. 4549.

Sawyer, C. J. says:

> "The supersedeas undoubtedly stays the issue of a writ of restitution and execution for costs. But none has been issued or asked for."

Certainly, the mere taking of an appeal with or without supersedeas does not terminate the *power* of the lower court.

> *In re Jugiro,* 140 U. S. 291, 296.

Harlan, J. says:

> "It is true that it would have been more appropriate and orderly if the State court had deferred final action until our mandate was issued and filed in the Circuit Court. But in view of the words of the statute, we do not feel authorized to hold that the order of the State court of December 1, 1890, made after the final judgment here of December 1, 1890, was absolutely void. * * * Nothing but an entire want of jurdisdiction in the State court to make the order of December 1, 1890, could have justified the Circuit Court in interfering with the proceedings by writ of habeas corpus. We are of opinion that there was no such want of jurisdiction."

A state statute authorizing an administrative liquidation by a public officer instead of a judicial liquidation by a court is constitutional.

Title Guarantee Co. v. Idaho, 240 U. S. 136;
Gibbes v. Zimmerman, 290 U. S. 326;
State Savings Bank v. Anderson, 165 Cal. 437, affirmed 238 U. S. 611;
Rainey v. Michel, 6 Cal. (2d) 259;
Drapeau v. Fullerton Corp., 8 Cal. (2d) 189.

May we point out too that in California it has long been settled that a receivership is simply a provisional remedy within the suit, and that an appeal from the judgment appointing the receiver does not stay the power of the receiver, in the absence of a stay order.

Matter of Real Estate Associates, 58 Cal. 356;
3 *Corpus Juris,* "Appeal and Error", sec. 1406, p. 1285, note 31, and cases cited.

The respondent court, therefore, respectfully urges that the petition for certiorari is entirely without merit and should be denied.

Dated, San Francisco, California,
July 7, 1943.

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